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Before the  
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In the Matter of

ADJUSTMENT OF RATES FOR  
NONCOMMERCIAL EDUCATIONAL  
BROADCASTING COMPULSORY LICENSE  
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) Docket No. 96-6 CARP NCBRA  
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**BROADCAST MUSIC, INC.'S REPLY IN FURTHER SUPPORT OF ITS  
MOTION TO EXTEND THE PRECONTROVERSY DISCOVERY SCHEDULE IN THIS  
PROCEEDING VIS-À-VIS ASCAP**

Marvin L. Berenson  
Joseph J. DiMona  
Broadcast Music, Inc.  
320 West 57th Street  
New York, NY 10019  
(212) 586-2000

Norman C. Kleinberg  
Michael E. Salzman  
Hughes Hubbard & Reed LLP  
One Battery Park Plaza  
New York, NY 10004  
(212) 837-6000

Attorneys for Broadcast Music, Inc.

Dated: November 25, 1997

Before the  
COPYRIGHT ARBITRATION ROYALTY PANEL  
UNITED STATES COPYRIGHT OFFICE  
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Washington, D.C.

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In the Matter of

ADJUSTMENT OF RATES FOR  
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MOTION TO EXTEND THE PRECONTROVERSY DISCOVERY SCHEDULE IN THIS  
PROCEEDING VIS-À-VIS ASCAP**

Broadcast Music, Inc. ("BMI") submits its reply in further support of its November 7, 1997 motion to extend the precontroversy discovery schedule in this proceeding. The American Society of Composers, Authors and Publishers ("ASCAP") objects to any extension of the discovery schedule with respect to BMI and ASCAP. There is no basis to ASCAP's opposition and BMI's motion should be granted.

First, ASCAP's assertion that BMI's motion should be denied because it was not filed by the November 7 due date is just plain wrong. BMI's motion was filed on November 7, the due date in the Copyright Office's July 30, 1997 Scheduling Order (the "Order") for motions related to initial document production.

Second, ASCAP argues that the prediscovery schedule set in the Order was "final"; but ASCAP fails to state that it was ASCAP's own unilateral disregard of the Order which necessitated BMI to seek an extension of the discovery schedule as to ASCAP. Under the Order,

written direct cases were to be filed (along with proof of service on counsel of record) on October 1, 1997. ASCAP, however, without prior consent, simply informed the Copyright Office and BMI, on the eve of the date scheduled for the filing of written direct cases, that it would be withholding certain key elements of its direct case from its service on BMI on confidentiality grounds. See letter from counsel for ASCAP to the Copyright Office of September 30, 1997, attached hereto as Exhibit A. ASCAP did so in spite of the fact that the parties to these proceedings, including ASCAP and BMI, had previously negotiated a Protective Order to govern confidentiality issues. During those negotiations ASCAP agreed that it would not have the right to withhold documents from BMI's counsel of record, and the Protective Order contained no such provision.

Because ASCAP failed to serve its entire direct case on BMI on October 1, BMI was not able to serve its discovery request on ASCAP on October 8, as required by the Order, because it still did not have a copy of ASCAP's complete case at that time. As of that date, ASCAP continued to take the position that it would not produce its entire direct case to BMI until such time as ASCAP had entered into a separate and additional confidentiality agreement with BMI.

ASCAP did not execute a final confidentiality agreement with BMI until October 21. Three days later, on October 24, BMI served its initial discovery request on ASCAP. ASCAP, however, did not produce documents to BMI until November 19.

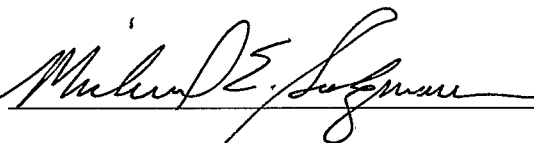
Because of ASCAP's late production, BMI will require even more time than it proposed in its original motion to extend the discovery schedule to make appropriate follow-up requests or motions, if any are required. ASCAP should not be able to rely on its own delay in complying with its discovery obligations to preclude BMI from making follow-up requests or motions.

While ASCAP makes a conclusory claim of prejudice with respect to BMI's request for an extension of the discovery deadlines, it has made no showing of any prejudice. Contrary to what ASCAP argues, BMI is not now seeking any change in the December 31, 1997 start date for the CARP proceeding.

### Conclusion

For the foregoing reasons and the reasons set forth in BMI's opening brief, BMI's motion to extend the discovery schedule vis-à-vis ASCAP should be granted.

Dated: November 25, 1997

By: 

Marvin L. Berenson  
Joseph J. DiMona  
Broadcast Music, Inc.  
320 West 57th Street  
New York, NY 10019  
(212) 586-2000

Norman C. Kleinberg  
Michael E. Salzman  
Hughes Hubbard & Reed LLP  
One Battery Park Plaza  
New York, NY 10004  
(212) 837-6000

Attorneys for Broadcast Music, Inc.

**CERTIFICATE OF SERVICE**

I, Sherri N. Duitz, an attorney, hereby certify that I caused a copy of the foregoing BROADCAST MUSIC, INC.'S REPLY IN FURTHER SUPPORT OF ITS MOTION TO EXTEND THE PRECONTROVERSY DISCOVERY SCHEDULE IN THIS PROCEEDING VIS-À-VIS ASCAP in the Matter of Adjustment of Rates for Noncommercial Educational Broadcasting Compulsory License, Docket No. 96-6, before the Copyright Arbitration Royalty Panel, United States Copyright Office, Library of Congress, to be delivered by overnight federal express on this 25th day of November, 1997 on each of the parties listed on the attached service list.

Deponent is over the age of 18 years and not a party to this action.

I further certify under penalty of perjury that the foregoing is true and correct.

Executed on November 25, 1997.

  
\_\_\_\_\_  
Sherri N. Duitz

## SERVICE LIST

### **Docket No. 96-6 CARP NCBRA**

Neal A. Jackson  
Denise Leary  
Gregory A. Lewis  
National Public Radio  
635 Massachusetts Avenue, N.W.  
Washington D.C. 20001  
PH: 202-414-2000  
FAX: 202-414-3329

Paula A. Jameson  
Ann W. Zedd  
Public Broadcasting Service  
1320 Braddock Place  
Alexandria, VA 22314-1698  
PH: 703-739-5000  
FAX: 703-739-5358

R. Bruce Rich  
Mark J. Stein  
Tracey I. Barr  
Weil, Gotshal & Manges LLP  
767 Fifth Avenue  
32nd Floor  
New York, NY 10153  
PH: 212-310-8000  
FAX: 212-310-8007

#### **Counsel for National Public Radio and Public Broadcasting Service**

I. Fred Koenigsberg  
Philip H. Schaeffer  
Joan M. McGivern  
J. Christopher Shore  
White & Case  
1155 Avenue of the Americas  
New York, NY 10036-2787  
PH: 212-819-8806  
FAX: 212-354-8113

#### **Counsel for ASCAP**

Carey R. Ramos  
Paul, Weiss, Rifkind, Wharton & Garrison  
1285 Avenue of the Americas  
New York, NY 10019-6064  
PH: 212-373-3000  
FAX: 212-373-2773  
**Counsel for NMPA/Harry Fox**

Kenneth M. Kaufman  
Davis Wright Tremaine  
1150 Connecticut Ave. N.W.  
Suite 1100  
Washington, D.C. 20036  
PH: 202-296-0533  
FAX: 202-296-0464  
**Counsel for SESAC**

Edward P. Murphy  
National Music Publisher's Association  
and The Harry Fox Agency, Inc.  
711 Third Avenue  
New York, NY 10017  
PH: 212-370-5330  
FAX: 212-953-2384

Henry R. Kaufman  
SESAC, Inc.  
421 West 54 Street  
New York, NY 10019  
PH: 212-586-3450  
FAX: 212-489-5699

Beverly A. Willett  
ASCAP Building  
American Society of Composers,  
Authors and Publishers  
Sixth Floor  
One Lincoln Plaza  
New York, NY 10023  
PH: 212-621-6289  
FAX: 212-787-1381  
**Counsel for ASCAP**

Bruce G. Joseph  
Karyn K. Ablin  
Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006  
PH: 202-429-7000  
FAX: 202-429-7049  
**Counsel for National Religious Broadcasters  
Music License Committee**

# WHITE & CASE

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WARSZAWA

## AFRICA

JOHANNESBURG

1155 AVENUE OF THE AMERICAS  
NEW YORK, NEW YORK 10036 2787

TELEPHONE: (1-212) 819 8200

FACSIMILE: (1-212) 354 8113

DIRECT DIAL: (212) 819-8740

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September 30, 1997

### VIA TELECOPIER AND BY HAND

Nanette Petruzzulli, Esq.  
Acting General Counsel  
Office of the Copyright General Counsel  
Room 403  
James Madison Building  
101 Independence Avenue, S.E.  
Washington, DC 20540

Re: Noncommercial Educational Broadcasting Compulsory License  
Docket No. 96-6 CARP NCBRA

Dear Ms. Petruzzulli:

On September 26, 1997, the parties to this proceeding filed a Motion for Entry of Protective Order with the Copyright Office (the "Office"). The parties have assumed that the Office will rule favorably on the Protective Order in the near future.

Since the filing of the Motion, a disagreement has arisen between ASCAP and at least one other party to this proceeding concerning certain highly sensitive and confidential information regarding the rates and terms for a compulsory license between ASCAP, Public Broadcasting Service ("PBS") and National Public Radio ("NPR"). That information is contained in ASCAP's written direct case. ASCAP believes this confidential material is irrelevant to the concerns of any party other than PBS or NPR.

It is unlikely that this dispute will be resolved before tomorrow when ASCAP must file and serve its written direct case in this proceeding on all parties. In the interim, and while we continue our discussions to resolve this issue, ASCAP will nevertheless comply with its obligations to file its direct case on October 1, 1997. ASCAP will serve a complete

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**WHITE & CASE**

Nanette Petruzzulli, Esq.

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copy of its written direct case on PBS, NPR and their counsel, on the understanding that they will adhere to the provisions of the submitted Protective Order. ASCAP will serve a redacted version on the other parties to this proceeding.

If ASCAP is unable to reach agreement regarding the handling of this highly sensitive and confidential information, ASCAP reserves its rights under paragraphs 11 and 3(b) of the Protective Order, if it is entered, to request the Office, the Library of Congress and/or the CARP, as appropriate, for clarification of and appropriate relief under that Protective Order.

Sincerely,

  
Philip H. Schaeffer

cc: Service List

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FROM W&amp;C FAX NY DEPT.

**SERVICE LIST**  
**DOCKET No. 96-6 CARP NCBRA**

Neal A. Jackson, Esq.  
Denise Leary, Esq.  
Gregory A. Lewis, Esq.  
National Public Radio  
635 Massachusetts Avenue, N.W.  
Washington, DC 20001  
PH: 202-414-2000  
FAX: 202-414-3329

**Paula A. Jameson, Esq.**  
**Ann W. Zedl, Esq.**  
**Public Broadcasting Service**  
**1320 Braddock Place**  
**Alexandria, VA 22314-1698**  
**PH: 703-739-5000**  
**FAX: 703-739-5358**

**R. Bruce Rich, Esq.  
Mark J. Stein, Esq.  
Tracey I. Batt, Esq.  
Weil, Gotschal & Manges LLP  
767 Fifth Avenue  
New York, New York 10153-0119  
PH: 212-310-8000  
FAX: 212-310-8007  
Counsel for PBS and NPR**

**Marvin L. Berenson, Esq.**  
**Joseph J. DiMona, Esq.**  
**Broadcast Music, Inc.**  
**320 West 57th Street**  
**New York, New York 10019**  
**PH: 212-830-2533**  
**FAX: 212-397-0789**

(TUE)09.30 / 18:18/SI.18:06/NV.35000000CF 4/0

FROM W&C FAX NY DEPT.

**Counsel for  
BMI -**

Norman C. Kleinberg, Esq.  
Michael E. Salzman, Esq.  
Hughes Hubbard & Reed, LLP  
One Battery Plaza  
New York, New York 10004  
PH: 212-837-6000  
FAX: 212-422-4726  
Counsel for BMI

**NMPA/  
Harry Fox -**

Mr. Edward P. Murphy  
President and CEO  
National Music Publishers' Association  
and The Harry Fox Agency, Inc.  
711 Third Avenue  
New York, New York 10017  
PH: 212-370-5330  
FAX: 212-953-2384

**Counsel  
for NMPA and Harry  
Fox Agency -**

Carey R. Ramos, Esq.  
Paul, Weiss, Risskind, Wharton & Garrison  
1285 Avenue of the Americas  
New York, New York 10019-6064  
PH: 212-373-3000  
FAX: 212-373-2773  
Counsel for NMPA/Harry Fox

**Counsel for  
NRBMLC -**

Bruce G. Joseph, Esq.  
Karyn K. Ablin, Esq.  
Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, DC 20006  
PH: 202-429-7000  
FAX: 202-429-7049  
Counsel for National Religious Broadcasters  
Music License Committee

**SESAC -**

Henry R. Kaufman, Esq.  
SESAC, Inc.  
421 West 54th Street  
New York, NY 10019  
PH: 212-586-3450  
FAX: 212-489-5699

**Counsel for SESAC -**

Kenneth M. Kaufman, Esq.  
Roberts & Eckard, P.C.  
Suite 1100  
1150 Connecticut Avenue, N.W.  
Washington, DC 20036  
PH: 202-296-0533  
FAX: 202-296-0464  
Counsel for SESAC

**U.S. Copyright Office -**

Tanya M. Sandros, Esq.  
Office of the Copyright General Counsel  
Room 403  
James Madison Building  
101 Independence Avenue, S.E.  
Washington, DC 20540  
PH: 202-707-8380  
FAX: 202-707-8366